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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 77

FEDERAL CARTRIDGE CORPORATION, *Appellant*

v.

THE SUPERIOR COURT OF CREEK COUNTY, BRISTOW DIVISION, AND THE HONORABLE G. B. CORYELL, Judge of said Court, and FRED ESPEY AND GENE SEARS, *Appellees.*

Appeal from the Supreme Court of Oklahoma

APPELLANT'S BRIEF IN OPPOSITION TO MOTION OF APPELLEE FRED ESPEY TO DISMISS THE APPEAL

Appellee in his motion to dismiss contends that appellant's challenge to the Oklahoma Venue Statute, Title 18, Sec. 1.204 (a), Okla. Statutes Annotated (set forth in full in Appendix B of appellant's jurisdictional statement herein and hereinafter called "Oklahoma Venue Statute") upon the ground that the Venue Statute as applied to appellant constitutes a denial of

the equal protection of the law under the Fourteenth Amendment to the Constitution of the United States, "is not an issue cognizable by this Court in an appeal as of right." (page 4 of appellee's motion). This contention is based upon appellee's assertion that:

(1) The Constitutional issue was not timely raised below; and

(2) The Constitutional question is not substantial.

These propositions will be discussed in order below.

I.

The Constitutional Question Was Raised in a Timely Manner in the Original Proceeding in the Oklahoma Supreme Court

Appellee's statement that appellant did not raise the constitutional question in the "trial court" (by which term appellee presumably means the Superior Court of Creek County) is irrelevant and is based upon a misconception of the nature of the proceedings of which appellant now seeks review. Under the law of the State of Oklahoma an application for a writ of prohibition against an inferior court in a civil proceeding must be brought in the Supreme Court of Oklahoma. *State* v. *Langmire*, 281 P. 2d 949 (Okla., 1955). Article VII, Sec. 2 of the Oklahoma Constitution under which appellant brought its application for a writ of prohibition clearly indicates that the issuance of such writs is within the original, as distinguished from the appellate, jurisdiction of the Oklahoma Supreme Court. In *State* v. *Caldwell*, 181 P. 2d 843 (Okla. Ct. App. 1947), the Court, in ruling upon an application for a writ of prohibition, poted that "this is an original proceeding" and pointed out that a writ of prohibition being in effect an injunction against the exercise of judicial power, "lies only as between courts which

sustain to each other the relation of superior and inferior". 181 P. 2d at 845.

In the case at bar the appellant, in the original proceeding in the Oklahoma Supreme Court, argued at some length that the Oklahoma Venue Statute constituted a violation of the Fourteenth Amendment of the Federal Constitution as applied to the appellant corporation (R. 28-34). Appellee, in its reply brief in the Oklahoma Supreme Court, made no attempt to challenge appellant's standing to raise the Constitutional issue but met this issue squarely and argued that the Oklahoma Venue Statute did not deprive appellant of equal protection of the laws under the Fourteenth Amendment. (R. 51-61). Accordingly, the Constitutional issue was properly before the Oklahoma Supreme Court in the original proceeding for a writ of prohibition. Even if appellee had challenged appellant's right to raise this issue in the Oklahoma Supreme Court, such challenge would have been unsuccessful because under the Oklahoma Law it is well-established that one seeking a writ of prohibition must simply call to the attention of the lower court its lack of jurisdiction. *Rogers* v. *Douglas*, 181 Okla. 32, 72 P. 2d 823, 826 (1937); *State* v. *Curry*, 208 Okla. 511 257 P. 2d 799 (1953). Appellant, in the proceeding in the Superior Court of Creek County, raised the venue issue (R. 15) and accordingly such issue was properly before the Supreme Court of Oklahoma which is, on an application for a writ of prohibition, the Court of first instance.

Appellee further argues that appellant must show that the Supreme Court of Oklahoma "deemed the Constitutional question to be in issue * * * and expressly passed on it." (Appellee's motion, page 5).

The case cited by appellee, *Memphis Natural Gas Company* v. *Beeler*, 315 U. S. 649, 86 L. ed. 1091 (1942) does not support this contention. In that case the appellant had not raised the Constitutional issue in a timely manner in the trial court nor had the Supreme Court of Tennessee passed upon this issue. In an opinion by Mr. Chief Justice Stone, this Court held:

> "Since it does not appear that the validity of the statute was *either* drawn in question *or* passed upon in the trial court *or* deemed by the State Supreme Court to be an issue, we must dismiss the appeal for want of jurisdiction." 315 U. S. at 651, 86 L. ed. at 1094 (Emphasis added).

The requirements that the Constitutional issue be expressly passed upon by the State court or that the highest court of the state must deem the Constitutional question to be in issue are stated in the disjunctive clearly indicating that such requirements become relevant only whre the Constitutional issue is not raised in a timely manner under State procedures. This same disjunctive phraseology of such requirements is found in Rule 16.1 (b) of the Rules of this Court. As noted above, the Constitutional issue was raised in a timely manner by the appellant in its original proceeding for a writ of prohibition in the Supreme Court of Oklahoma and therefore the question of whether such court expressly passed upon the Constitutional issue or deemed such issue to be before it is irrelevant. To hold otherwise would give to a state court the power absolutely to cut off a litigant's right of appeal to this Court by simply failing to indicate the basis for its ruling as was done here by the Oklahoma Supreme Court in its denial of appellant's application for a writ of prohibition. (pages ii and iii, Appendix to Jurisdictional Statement). Such a result would empower

state courts to nullify the remedy of appeal to this Court provided by 28 U.S.C.A. 1257(2).

Appellant has done all that it can properly to raise the Federal Constitutional issue in the original proceeding in the Oklahoma Supreme Court. Accordingly, this issue is properly before this Court.

2.

The Constitutional Question Raised by This Appeal is Substantial

Appellee states that the appellant corporation is "illegally doing business in Oklahoma." (Motion page 2). Such assertion is not founded on any facts in the record and indeed the appellant has consistently maintained the position that it does not do business, illegally or otherwise, in the State of Oklahoma. Appellee's position is apparently that the mere assertion by a plaintiff that a foreign corporation is doing business in Oklahoma together with the admitted fact that such corporation, believing in good faith that it does not do business in Oklahoma, has not domesticated itself under the laws of Oklahoma makes the corporation an outlaw beyond the protection of the Fourteenth Amendment. Not surprisingly, no cases are cited which even remotely support such a proposition.

It should further be noted that the practical operation of the Oklahoma Venue Statute is such that the burden of having to appear and defend a lawsuit in any one of the states seventy-seven counties (regardless of whether that county has any relation whatever to the plaintiff, the defendant, or the cause of action) is imposed upon a foreign corporation before a judicial determination may be made as to whether such cor-

poration is, in fact, doing business in Oklahoma. Thus, even on the "outlaw" theory advanced by the appellee, the punishment comes before there has even been a judicial determination of whether such punishment is proper.

Appellant concedes that the case of *Power Manufacturing Company* v. *Saunders*, 274 U. S. 490, 71 L. ed. 1165 (1927) differs from the case at bar in that the Arkansas Venue Statute there in issue discriminated against all foreign corporations while the Oklahoma Venue Statue discriminates against foreign corporations sued in Oklahoma by a plaintiff alleging that such corporations do business in Oklahoma and are not domesticated under the laws of that State. The discrimination in the case at bar is, however, equally unreasonable. The concept of what constitutes "doing business" is exceedingly subtle and complex and is susceptible to no hard and fast rule. *International Shoe Company* v. *Washington*, 326 U. S. 310, 319, 90 L. ed. 95, 103-104, (1945). The Oklahoma Venue Statute, in effect, requires a foreign corporation to make this difficult determination and, as a penalty for a corporation's good faith determination that it does not do business in Oklahoma, to be subject to suit in any one of the seventy-seven counties in the State, irrespective of whether there is any relationship between such county and any of the litigants or the cause of action itself. No reasonable basis exists for such discrimination and, significantly, none has been indicated by the appellee other than applying to such corporations the epithet "illegal".

Such discrimination against certain foreign corporations by a state statute clearly presents a substantial

Federal Constitutional question.* In *Power Manufacturing Company* v. *Saunders, supra*, this Court held that an Arkansas Venue Statute similarly discriminating against foreign corporations violated the Fourteenth Amendment. The question of whether the Oklahoma Venue Statute falls within the ambit of this Court's holding in *Power Manufacturing Company* is thus squarely presented by this appeal and should be passed upon by this Court.

CONCLUSION

For the reasons set forth herein and in the Jurisdictional Statement previously filed, appellant submits that this appeal presents a substantial Federal Constitutional question which requires the presentation and consideration of briefs and oral argument for its resolution.

Respectfully submitted.

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*Appellee suggest on pages 5-6 of his motion that the substantiality of a federal question presented to this Court is somehow dependent upon the number of persons affected and that if only a small number of persons are deprived of equal protection of the laws then the federal question is not "substantial." No authority is cited in support of this statistical test of substantiality.

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